(1)

Supreme Court, U.S.
FILED

00 909 SEP 1 2 2000

OFFICE OF THE CLERK

NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Garcia, Petitioner

v.

County of Los Angeles Sheriff's Department, Charles Brittain, and James Platis, Respondents.

On Petition for Writ of Certiorari

To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

Scott E. Schutzman, Esq.
Law Offices of Scott E. Schutzman
3700 South Susan Street, Suite 120
Santa Ana, California 92704
714-543-3638

36pp

Richard Garcia, Petitioner herein, respectfully prays for writ of certiorari issue to review the judgment of the California Supreme Court, entered on June 14, 2000.

QUESTION PRESENTED

Whether Respondents' pattern of failing to place inmates on "keep-away," when they are on notice of substantial risk of harm to endangered inmate constitutes a policy or custom of deliberate indifference of inmates' safety.

TABLE OF CONTENTS

QUESTION PRESENTED i

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

Factual Summary: 2
Rulings Below: 3

REASONS FOR GRANTING THE WRIT 4

I. Certiorari Should Be Granted When a State Court of Last Resort Conflicts with the Supreme Court's Decisions 4

A. The Supreme Court's Teaching Regarding "Custom" Is Clear. 4

B. The Supreme Court's Teaching Regarding "Deliberate Indifference" Is Clear. 5

II. Certiorari Should Be Granted When a State Court of Last Resort Conflicts with the Federal Circuit Court Decisions. 6

CONCLUSION 7

APPENDIX 8

Ruling of the Supreme Court of California on Appellant's Petition for Review 8

Ruling of the California Court of Appeal, Second Appellate District on Petition for Rehearing .. 9

Opinion of the California Court of Appeal, Second Appellate District, on Appeal from a Judgment of the Superior Court of Los Angeles County .. 10

Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved 30

TABLE OF AUTHORITIES

Case Law:

Hemphill v. Kincheloe, 987 F.2d 598 (9th Cir. 1993) .. 6

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 5

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915 5

Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994) 4,5,6

Hicks v. Finney, 770 F.2d 375 (3rd Cir. 1985) 6

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978) 4

Constitution and Amendments:

Fifth Amendment to the Constitution 1,30

Fourteenth Amendment , Section 1 1,30

Statutes and Codes:

28 U.S.C. § 1257 1

42 U.S.C. § 1983 1,31

OPINIONS BELOW

The June 14, 2000 judgment, which judgment is herein sought to be reviewed, affirmed the appellate opinion of March 21, 2000 and is labeled as Case No. B 128083, June 14, 2000, California, herewith reprinted in the separate Appendix to this Petition, p. 8.

The prior opinion of the California Appellate Court, for the Second District, filed on March 21, 2000 is labeled Case No. B 128083 (Los Angeles County Super. Ct. No. BC 176160), and is reprinted in the separate Appendix to this Petition, p. 10.

The Petition for rehearing of the California Appellate Court decision filed on March 21, 2000 was denied on April 10, 2000, and is reprinted in the separate Appendix to this Petition, p. 9.

STATEMENT OF JURISDICTION

The judgment of the California Supreme Court was entered on June 14, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Fifth and Fourteenth Amendments of the United States Constitution, reprinted in the Appendix at pp. 30.

42 U.S.C. § 1983, reprinted in the Appendix at pp. 31.

STATEMENT OF THE CASE

This is a deprivation of due process action brought by Petitioner pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983. The complaint sought to recover for injuries caused by numerous stab wounds that Petitioner suffered while in Respondents' custody at the Los Angeles County Men's Central Jail.

Factual Summary:

It is undisputed that Petitioner told his criminal defense lawyer, Frank Duncan, that Petitioner was concerned about his safety. Several Hispanic inmates instructed Petitioner, a Hispanic also, to stab an African-America inmate, or Petitioner should be stabbed. It is further undisputed that Mr. Duncan articulated the concern for the security of his client on the record in front of the Judge hearing the criminal matter, and that the Deputy District Attorney, Anthony Manzella, prosecuting Petitioner, in turn, reported this concern to Lieutenant Ronald E. Gipson, a watch commander at the Los Angeles County Jail.

After Lt. Gipson received the telephone call from Mr. Manzella, Lt. Gipson, the watch commander at the Los Angeles County Jail, instructed that Petitioner be placed on "keep-away" status.

Lt. Gipson designated Deputies Charles Brittain and James Platis, Respondents herein, to place Petitioner on "keep-away" status, that is, put him in an isolated cell.

Lt. Gipson gave the instruction to place Petitioner on "keep-away" status on June 5, 1996. For the next five

days, neither Deputy Brittain nor Deputy Platis placed Petitioner on "keep-away" status.

Substantial evidence was provided that for a six-year period from 1990 to the date that the incident occurred, two or three "keep-away" inmates a week were not placed in the correct location and were at risk.

On June 10, 1996, Petitioner was stabbed numerous times by African-American inmates in the same module he was housed on June 5, 1996 when the "keep-away" request was made.

Rulings Below:

The Superior Court of Los Angeles County, on summary judgment, entered judgment in favor of Respondent on the basis that Respondents' conduct did not constitute "deliberate indifference"; that Respondents can claim immunity because they did not violate any statutory or constitutional rights, about which a reasonable person would have known; and that no policy or custom of deliberate indifference to inmates' safety existed.

The California Appellate Court, second district, affirmed judgment. And denied Petitioner's request for rehearing.

The California Supreme Court denied Petitioner's petition for review, entered on June 14, 2000.

///

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted When a State Court of Last Resort Conflicts with the Supreme Court's Decisions.

The state courts of California conflict with the Court's decisions, as it relates to two separate issues: 1) The definition of policy or custom for purposes of § 1983 municipal liability, as published in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978); and, 2) The definition of deliberate indifference, as taught by this Court in Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994).

A. The Supreme Court's Teaching Regarding "Custom" Is Clear.

Regarding the issue of policy, this Court instructed, in Monell, as follows:

> although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, ***may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision-making channels.***

Monell, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2036

(quotations in original) (emphasis added).

Further elaborating the principle of "custom," this Court instructed that a "plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or expressed municipal policy, is 'so permanent and well-settled as to constitute a custom or usage with the force of law.'" City of St. Louis v. Praprotnik, 485 U.S. 112, 120, 108 S. Ct. 915, 926 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 168, 90 S. Ct. 1598, 1614).

Contrary to this Court's teachings, the California Supreme Court, by affirming the state's appellate court's decision, decided that Petitioner was not allowed to prove "custom."

B. The Supreme Court's Teaching Regarding "Deliberate Indifference" Is Clear.

This Court taught that prison officials can be held liable for harm upon an inmate "if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984.

Evidence was produced that Respondents knew that Petitioner's life was in grave danger. Petitioner also produced evidence that Respondents' actions were not reasonable in that, despite their knowledge of Petitioner's grave danger, they took steps they knew would not result in separating Petitioner from general population.

///

II. Certiorari Should Be Granted When a State Court of Last Resort Conflicts with the Federal Circuit Court Decisions.

California Supreme Court's application of the principle of qualified immunity conflicts with the application by the Ninth Circuit Court of Appeals in Hemphill v. Kincheloe, 987 F.2d 598 (9th Cir. 1993), and by the Third Circuit Court of Appeals in Hicks v. Finney, 770 F.2d 375 (3rd Cir. 1985).

Specifically, An official is not protected by qualified immunity "when [their] conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Hicks, 770 F.2d 375, 379-80. Since, at least 1994, it has been clearly established that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Farmer, 511 U.S. 825, 831, 114 S. Ct. 1970.

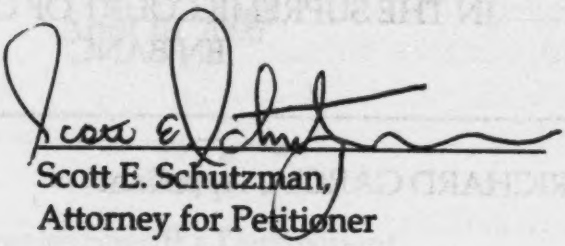
Evidence indicated that Respondents left Petitioner in general population for five days, without taking reasonable steps to isolate him. Respondents simply "passed the buck" unto other anonymous prison officials. Respondents left for their weekend while leaving Petitioner in general population, only to be stabbed numerous times on Monday morning. The alleged attempts by Respondents, to isolate Petitioner, betrays their knowledge of protecting Petitioner's Constitutional rights to be protected from violence by other inmates.

///

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

Law Offices of Scott E. Schutzman



Scott E. Schutzman,
Attorney for Petitioner

//

APPENDIX

OPINIONS BELOW

Second Appellate District, Division Three, No. B128083
S087939

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

RICHARD GARCIA, Appellant

v.

COUNTY OF LOS ANGELES SHERIFFS' DEPARTMENT, Et Al., Respondents

---

Appellant's petition for review DENIED.

SUPREME COURT
FILED
Jun 14, 2000
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

April 10, 2000

Richard Garcia
v.
County of Los Angeles Sheriff's Department

B128083
Los Angeles County No. BC176160

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RICHARD GARCIA	B128083
Plaintiff and Appellant,	(Los Angeles County Super. Ct. No. BC176160)
v.	COURT OF APPEAL SECOND DIST. FILED Mar 21, 2000 Joseph A. Lane Clerk _____ Deputy Clerk
COUNTY OF LOS ANGELES SHERIFFS' DEPARTMENT et al.,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles W. McCoy, Judge. Affirmed.

Scott E. Schutzman for Plaintiff and Appellant.

Lloyd W. Pellman, County Counsel, Brian T. Chu, Deputy County Counsel, and Bart Dalton, Senior Associate County Counsel, for Defendants and

Respondents.

INTRODUCTION

Plaintiff appeals a judgment following the grant of a summary judgment motion on plaintiff's cause of action for violation of civil rights (42 U.S.C. § 1983), which alleged that defendants' treatment of him while he was an inmate in the Los Angeles County jail violated his constitutional due process rights. We conclude that defendants' conduct fell well short of deliberate indifference for his safety, and also that defendants can claim the protection of qualified immunity insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Plaintiff also failed to show that defendant Los Angeles County Sheriff's department had a policy or "custom" of deliberate indifference to inmate safety. We also conclude that no abuse of discretion occurred because the trial court denied plaintiff's new trial motion based on a newspaper report. We affirm the grant of summary judgment.

STANDARD OF REVIEW

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc. §437c, subd.(a).) Separate statements setting forth plainly and concisely all material facts which the parties contend are undisputed must be included. (*Ibid.*) The trial court shall grant the summary judgment motion if all the papers submitted show that no

triable issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that no triable issue exists as to any material facts, the court shall consider all of the evidence and all inferences reasonably deducible from the evidence, except that summary judgment shall not be granted on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. (*Id.* at subd.(c).)

Defendants meet their burden upon a summary judgment motion if they have provided that "one or more elements of the cause of action...cannot be established, or that there is a complete defense to that cause of action." (Code Civ.Proc. §437c, subd.(o)(2).) Once defendants have met that burden, the "burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists[.]" (*Ibid.*; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573).

In a summary judgment proceeding, the moving defendants bear the burden of proving the absence of any triable issue of material fact, even though at trial the plaintiff would have the burden of proof on a particular issue. To secure summary judgment, defendants must either prove an affirmative defense, disprove at least one essential element of plaintiff's cause of action, or show that plaintiff cannot establish one element of the cause of action. The defendants must show that under no possible hypothesis within the reasonable scope of the complaint does a material question of fact require examination by a trial. Once the moving parties have met that burden, the opposing party bears the burden of presenting evidence that there is a triable issue of fact as to any essential

element of the causes of action. (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1465.)

FACTS AND PROCEDURAL HISTORY

The Complaint: Plaintiff Richard Garcia filed a complaint for damages against defendants the County of Los Angeles Sheriff's Department and Sheriff's Deputies Charles Brittain and James Platis. The Complaint alleged causes of action for deprivation of civil rights (42 U.S.C., § 1983) and for negligent hiring, training, and retention of employees.

The complaint alleged that while Garcia, a defendant in a criminal trial, was in jail Hispanic inmates told Garcia they wanted him to stab African-American inmates. The trial judge ordered the Sheriff's Department to place Garcia on "keep away" status, i.e., to separate and keep him away from other inmates. Several days later, just before the not guilty verdict in Garcia's trial, the Sheriff's Department placed Garcia into the regular prison population, and while in custody in County Jail four African-American inmates stabbed Garcia.

The Demurrer: On October 29, 1997, the trial court sustained a demurrer to the cause of action for negligent hiring without leave to amend, but overruled a demurrer to the cause of action for violation of civil rights (42 U.S.C., § 1983).

Defendants' Summary Judgment Motion: On August 7, 1998, defendants moved for summary judgment or summary adjudication of issues. Plaintiff Garcia filed opposition and a separate statement.

While his trial was pending, Garcia voiced concerns about his safety to his defense attorney, Frank Duncan.

On June 5, 1996, Duncan stated his concern about Garcia's safety on the record before Judge Jones, who heard Garcia's criminal matter, and in the presence of Anthony Manzella, the deputy district attorney prosecuting Garcia. Manzella stated he would advise the Sheriff's Department of the situation. In the afternoon session on June 5, 1996, Manzella stated that during the noon hour he spoke to the watch commander, who assured Manzella he would transfer Garcia out of the module where he was placed.

A Sheriff's inmate special handling request prepared by Lieutenant Ronald Gipson showed that based on death threats, Garcia was placed on "keep away" status on June 5, 1996. After that placement, defendants Brittain and Platis were liaison officers responsible for interviewing and evaluating Garcia. On June 6, 1996, Brittain saw the special handling request, contacted Gipson, and checked his housing list, which showed Garcia should have been housed in module 1750. Brittain went to module 1750 to interview Garcia, but learned he was scheduled for court that day. He also checked housing records, which showed that Garcia had not been transferred to module 1750. Brittain ascertained that Garcia's previous housing module was 3400, telephoned the deputy in that module, and learned Garcia was still housed in module 3400. He was told Garcia had already left the jail for court that morning.

That meant Brittain could not talk to Garcia until the next day, and also that Brittain could not have Garcia transferred and isolated immediately. He instructed the module deputy that Garcia was designated a "K-10" or "keep away," and that on his return from court Garcia was to be transferred immediately and isolated in module 1750. Brittain also telephoned the "court line," where all inmates

are checked out of the jail to go to court and back into the jail when they return. Brittain gave instructions that Garcia was a "K-10" and should be flagged when he returned from court and isolated and transferred to module 1750.

Brittain had a day off and did not work June 7, 1996, but on June 6 he had talked to his partner, Deputy Platis, and left instructions for Platis to follow up and interview Garcia. Brittain assumed that on the morning of June 7, Platis would find Garcia isolated in module 1750, D row.

Platis testified that jail records showed Garcia went to court at 3:02 a.m. on June 7. When Platis discovered Garcia was not in the jail on the morning of June 7, he called module 3400 to tell them to move Garcia to module 1750 when he came back from court. Platis also called the court line and told deputies there to move Garcia to module 1750 when he returned from court. Neither Brittan nor Platis worked Saturday, June 8, or Sunday, June 9, 1996.

At 5:10 a.m. on June 10, 1996, during a fight in the 3400 Module, African-American inmates stabbed Garcia. On June 10, 1996, Britain and Platis discovered Garcia had not been moved out of the module 3400 and that the stabbing had occurred.

Defendants alleged this case, in which Garcia was not isolated as requested by Deputies Brittain and Platis, was an anomaly and that it is County custom, policy, and practice to segregate those placed in "keep away" status. Plaintiff Garcia disputed this evidence, citing Brittain's testimony that "this type of thing" was "not an uncommon occurrence" at the County jail. Plaintiff cited Platis's testimony that out of 40 to 50 interviews of inmates placed

on "keep away" status, two or three a week were not placed in the correct location. Plaintiff also cited Gipson's testimony that it was frequent for inmates to be stabbed in County jail.

Grant of Summary Judgment: On September 24, 1998, the trial court granted summary judgment and ordered judgment be entered in favor of defendants. On November 3,1998, plaintiff filed a new trial motion. Although it is not in the record on appeal, the trial court denied that motion.

Notice of Appeal: Garcia filed a timely notice of appeal on December 9, 1998.

ISSUES

Garcia claims on appeal that:

1. Los Angeles County had a custom of acting with deliberate indifference by not placing prisoners with death threats against them on "keep away" status;

2. A triable issue of fact exists about whether Brittain and Platis were entitled to qualified immunity, assuming it had been pleaded;

3. The trial court ignored Garcia's "failure to train" negligence theory; and

4. The trial court erroneously denied Garcia's new trial motion based on newly discovered evidence.

DISCUSSION

1. *No Triable Issue of Fact Exists Regarding the Section 1983 Cause of Action*

The complaint alleged a violation of 42 United

States Code section 1983[1] insofar as Brittain and Platis, acting under color of law and in their official capacity, recklessly and with conscious disregard violated Garcia's constitutional rights including his rights to freedom from wrongful and improper imprisonment and freedom from physical abuse, coercion, and intimidation as secured by the due process clauses in the Fifth and Fourteenth Amendments to the United States Constitution. The complaint also alleged violation of Garcia's rights under the Fourth Amendment to the United States Constitution.

Because due process requires that pretrial detainees may not be punished, the courts analyze a pretrial detainee's claims under the Fourteenth Amendment Due Process Clause rather than under the Eighth Amendment prohibition against cruel and unusual punishment. (*Bell v. Wolfish* (1979) 441 U.S. 520, 535, fn. 16.) However, the same standard applies to claims under both amendments. (*Frost v. Agnos* (9th Cir. 1998) 152 F.3d 1124, 1128.) A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the constitution. (*Farmer v. Brennan* (1994) 511 U.S. 825, 828-829.) Prison officials must take reasonable measures to guarantee inmates' safety, and have a duty to protect prisoners from violence at the hands of other prisoners. (*Id.* at pp. 832-

---

[1]In relevant part, 42 United States Code section 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party inured in any action at law, suit in equity, or other proper proceeding for redress[.]"

833.)

Not every injury a prisoner suffers at the hands of another translates into prison officials' constitutional liability. First, the deprivation alleged must be, objectively, "sufficiently serious" and where the plaintiff claims a failure to prevent harm, the inmate must show he was incarcerated under conditions posing a substantial risk of serious harm. Second, the plaintiff must show that the prison official had a "sufficiently culpable state of mind." In prison-conditions cases, that mental state is one of "deliberate indifference" to inmate safety. (*Farmer v. Brennan, supra,* 511 U.S. at p. 834.)

Garcia's appeal implicates the second requirement. *Farmer* establishes the test for "'deliberate indifference.'" This phrase describes a level of culpability lying somewhere between two extremes: it refers to a state of mind more blameworthy than negligence, yet the mental state of "deliberate indifference" can exist based on something less than acts or omissions which have the purpose of causing harm or with knowledge that harm will result. (*Farmer, supra,* 511 U.S. at pp. 835-836.) "Deliberate indifference" has been equated with "recklessness," to which *Farmer* gave a subjective definition. To be liable, a prison official must both know of and disregard an excessive risk to inmate health or safety. (*Id.* at p. 837.) *Farmer* held that a prison official may be held liable for denying humane conditions of confinement "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." (*Id.* at p. 847.)

Here prison officials knew of a substantial risk of serious harm. But they did not disregard that risk: they

took reasonable measures to abate it. Garcia was placed on "keep away" status on June 5, 1996. The next day Brittain attempted to interview Garcia, but Garcia was in court. Brittain also determined that Garcia had not been transferred to module 1750. He instructed the module deputy that Garcia was a "K-10" or "keep away," and that when Garcia returned from court he should be transferred immediately and isolated in module 1750. Brittain also phoned the "court line" and gave instructions that Garcia should be flagged as a "keep way" when he returned from court and isolated and transferred to module 1750. Britain, who did not work the next day, also instructed Platis to follow up and interview Garcia. The next morning, on June 7, Garcia was transferred to court at 3:02 a.m., and was not available for Platis to interview. Platis again instructed module 3400, where Garcia was housed, to move Garcia to Module 1750 when he came back from court. Platis also called the court line and gave them that instruction. These instructions were not carried out over the weekend, when neither Brittain nor Platis were at work.

The actions of Brittain and Platis fall well short of "deliberate indifference" to the risk of harm to Garcia. The steps they took were a reasonable response to the risk of harm to Garcia. The real problem was that other, unnamed prison officials did not follow those instructions. That failure to act does not transform the reasonable steps taken by Brittain and Platis into the "deliberate indifference" that *Farmer* requires. We conclude as a matter of law that the evidence shows neither negligence by Brittain and Platis nor anything that can be called a " 'culpable state of mind.' " (*Farmer v. Brennan, supra,* 511 U.S. at p. 834.) "[P]rison officials who actually knew of a

substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." (*Id.* at p. 844.)

2. *Brittain and Platis Are Entitled to Qualified Immunity*

Defendants' summary judgment motion claimed the protection of qualified immunity. On appeal, Garcia makes two arguments regarding defendants' claim to qualified immunity.

a. *Garcia Waived His Objection to the Qualified Immunity Defense*

First, Garcia claims that defendants' answer failed to plead qualified immunity as an affirmative defense, and thus the trial court should not have granted summary judgment on that ground.

Plaintiff cites only *Harlow v. Fitzgerald* (1982) 457 U.S. 800 for this argument. *Harlow* does cite the rule that a defendant government official must plead the affirmative defense of qualified immunity. (*Id.* at p. 815.) However, defendants' summary judgment motion raised the qualified immunity defense, and Garcia's opposition responded to the merits of that defense without objecting that it had not been pleaded. Because Garcia made no procedural objection based on failure to plead and argued against qualified immunity on the merits, he may not assert the pleading defect for the first time on appeal. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 48; *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876-877.)

b. *Brittain and Platis Can Claim Qualified Immunity*

Second, Garcia argues that a triable issue of fact exists whether the actions of Platis and Brittain were reasonable insofar as they knew for four or five days that Garcia, against whom death threats were made, was not placed on "keep away" status as ordered by their supervisor.

Although Gipson placed Garcia on "keep away" status, other prison officials did not follow repeated instructions from Platis and Brittain to move Garcia physically from module 3400 to the isolation of module 1750. The question is whether that failure prevents Platis and Brittain from claiming qualified immunity.

Harlow v. Fitzgerald defines qualified immunity as follows: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow, supra,* 457 U.S. at p. 818.)

It was not unreasonable for Platis and Brittain to rely on other officers who were responsible for carrying out their instructions. This is particularly true in circumstances when Garcia was moved in and out of the jail traveling to and from the courthouse. Garcia was not under the physical control of Platis and Brittain, and his arrivals and departures from the jail took place when Brittain and Platis were not on duty. The record offers no basis for concluding that Brittain or Platis believed their conduct was anything other than lawful. Officers are immune unless "the law clearly proscribed" the actions they took. (*Mitchell v. Forsyth* (1985) 472 U.S. 511, 528.)

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." (*Malley v. Briggs* (1986) 475 U.S. 335, 341.) There is no question either of incompetence or knowing violation of the law, and qualified immunity therefore protects Brittain and Platis. Summary judgment based on qualified immunity is therefore appropriate. *(Hemphill v. Kincheloe* (9th Cir. 1993) 987 F.2d 589, 593.)

3. *Garcia Has Not Shown That the Sheriff's Department Had an Official Policy, Custom, or Practice of Deliberate Indifference to Inmates' Safety*

Garcia agues that Los Angeles County had an official policy, custom, and practice of not placing prisoners subject to death threats on "keep away" status, which constitutes a violation of Garcia's constitutional rights.

Garcia cites the declaration of Mark Milburn, a Los Angeles County Sheriff's Department Lieutenant assigned to the Men's Central Jail for nine years and responsible for overseeing many facts of jail operations, including the liaison office. The liaison office identifies inmates who require housing segregated from the general prison population for various reasons, one of which is when an inmate is subject to attacks by other inmates. Milburn's declaration stated: "It is, and was on June 6, 1996, the policy, custom, and practice, of the [Los Angeles County Sheriff's Department] to protect inmates from danger whenever possible. [¶] The circumstance of Mr. Richard Garcia, in that he was placed into the general population when it was requested by the liaison office that he be kept segregated in a one man cell, is an anomaly. It was as of

June 6, 1996 and is the custom, policy, and practice of the [Los Angeles County Sheriff's Department] that inmates who are classified as 'keep-away' be kept segregated until the liaison officers have an opportunity to interview them."

Garcia cites Brittain's testimony that before June 5, 1996, the failure to move a prisoner placed on "keep away" status to module 1750 "was not an uncommon occurrence." Garcia further cites Platis's testimony regarding incidents where prisoners on "keep way" status were not moved to module 1750 when they were supposed to be moved. Platis estimated this happened "maybe two or three a week out of, approximately, forty to fifty interviews" during 1990 to 1996.

Garcia argues that this testimony creates a triable issue of fact whether the Sheriff's Department had a policy, custom, or usage of deliberate indifference by not placing people with death threats against them on "keep away" status after they were ordered to do so.

a. *The Sheriff's Department Had No Official Policy to Act with Deliberate Indifference to Inmates' Safety*

Local governing bodies can be sued directly under 42 United States Code section 1983 where an allegedly unconstitutional action implements or executes a policy statement, ordinance, regulation, decision or "government 'custom.'" (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691.) *Monell*, however, rejected local government liability based on a respondeat superior theory. (*Id.* at p. 691.) Liability must be based on more than the employment of a tortfeasor. "[I]t is when

execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the government as an entity is responsible under [section] 1983." (*Id.* at p. 694.)

The record provides no evidence that after being classified in "keep away" status, Garcia was not transferred from module 3400 to module 1750 because of an "'official policy.'" The record discloses no formal rule or understanding, written or otherwise; no legislative decision or enactment; and no act or edict made, by an official, which can be said to represent official policy. (*Pembaur v.* Cincinnati (1986) 475 U.S. 469, 480.) The failure to transfer Garcia, despite instructions of Brittain and Platis, did not represent either an official policy establishing a fixed plan of action to be followed under similar circumstances over time, or a governmental choice by policymakers of a course of action tailored to a particular situation and not intended to control decisions in later situations. (*Id.* at pp.480-481.) Moreover, no official "policymaker" was involved. "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." (*Id.* at p. 481.)

"[M]unicipal liability under [section] 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." (*Pembaur v. Cincinnati, supra,* 475 U.S. at pp. 483-484.) No evidence exists that the failure to transfer Garcia was either official, a policy, or resulted from a policymaker's decision or exercise of discretion. We find no basis for

section 1983 liability under Monell.

b. *The Sheriff's Department Had No "Custom" of Acting With Deliberate Indifference to Inmates' Safety*

Garcia argues that based on Platis and Brittain's testimony about the frequency of failure to transfer inmates in "keep away" status to secured confinement, the Sheriff's Department had a custom of acting with deliberate indifference to inmates' safety.

Congress included "custom" in section 1983 to provide a basis for a suit for violation of civil rights when, despite no formal approval through official governmental decision making channels, state officials engage in discriminatory practices that become "widespread" and sufficiently permanent and well settled as to constitute a custom or usage with the force of law. (*Monell, supra,* 436 U.S. at p. 691.) Proof of random acts or isolated events are not sufficient to establish custom. (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1444.)

To support the existence of a custom or usage of "deliberate indifference" to inmates' safety, Garcia cites Brittain's and Platis's testimony, summarized *supra.* Brittain's vague testimony that the failure to move a prisoner placed on "keep away" status to module 1750 "was not an uncommon occurrence" does not establish the existence of custom under *Monell.* Although Platis's testimony was more specific-two or three instances of failure to move a "keep away" inmate out of 40 to 50 interviews per week-this does not constitute a widespread, permanent, well-settled custom of deliberate indifference to inmates' safety. Platis's "estimate" shows

that the prison keepers fell short of perfect compliance in carrying out the policy referred to in Milburn's declaration. The relatively few instances of failure to execute Department policy show the need for administrative improvement. Nonetheless they constitute exceptions, deviations, or aberrations from policy. To conclude otherwise would be to stand the definition of what constitutes a policy (or custom) on its head and to define exceptions, deviations, or aberrations as an official policy or custom. Such a procedure would convert a few instances in which policy is not followed into the policy itself.

We find no triable issue of fact concerning whether a Sheriff's Department "custom or usage" existed pursuant to which Sheriff's deputies acted with deliberate indifference to inmates' safety.

4. *Failure to Train as a Section 1983 Violation*

The trial court dismissed Garcia's cause of action for negligent hiring, training, and retention against the Los Angeles County Sheriff's Department after sustaining a demurrer without leave to amend. Nonetheless Garcia claims that his first cause of action for violation of civil rights under 42 United States Code section 1983 alleged, in paragraph 13, included failure to train with deliberate indifference.

Paragraph 13 stated: "[D]efendant officers were servants, agents and employees of co-defendant, Sheriff Department, so their acts are imputed to defendant Sheriff Department. Defendant officers were acting pursuant to specific orders and directives from the County of Los Angeles Sheriff's Department and/or previously

established policy, custom, and usage. Plaintiff further alleges that there have been repeated incidents of the herein mentioned wrongful conduct."

Garcia does not seek review of the second cause of action for negligent hiring, training, and retention. Instead, he attempts to interpret paragraph 13 to include a "failure to train" violation of section 1983 in the first cause of action. But neither Paragraph 13 nor any other part of the first cause of action refers to failure to train with deliberate indifference. Garcia made no motion to amend in the trial court before judgment was entered to include this failure to train violation of section 1983. Therefore the matter is waved on appeal. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1664.)

5. *No Abuse of Discretion Arose From Denial of the New Trial Motion*

Garcia claims that the trial court erroneously denied his new trial motion. Garcia bases his claim on appeal on one ground in the new trial motion: that a September 4, 1998 *Los Angeles Times* article reported there was a "rogue force" of Sheriff's deputies at the Twin Towers jail "who mete out their own justice." The motion argued that if Garcia had known this fact, he could have ascertained an additional "policy" in the opposition to the summary judgment to create a triable issue of fact whether the County of Los Angeles had a policy, custom, or practice of deliberate indifference to inmates' safety.

First, as defendants point out, the new trial motion did not comply with the Code of Civil Procedure section 658 requirement that a claim of newly discovered evidence

must be made upon affidavits. Statutory requirements for determining a new trial motion are mandatory and must strictly followed. A new trial motion on grounds enumerated in section 658 must be presented solely by affidavit. (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 644-645.)

Second, the newspaper article was hearsay. (*Tibbetts v. Van de Kamp* (1990) 222 Cal.App.3d 389,395, fn. 5.)

Third, the newspaper article was not "material for the party making the application" based on newly discovered evidence. (Code Civ.Proc., § 657, subd. (4).) In the trial court, plaintiff made only a brief, conclusory argument that the newspaper article was material.[2] The article did not name the "rogue deputies" or connect them with deputies having contact with Garcia. The article included a statement by Sheriff Sherman Block that deputies who "set up their own brand of punishment" were "unacceptable to us."

" '[T]he granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears....' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 106, 109; see also *Fredrics v. Paige* (1994) 29

---

[2]The new trial motion argued that the Los Angeles Times article was material in a single sentence: "This evidence is material to an issue in the litigation, that it is a policy of the Los Angeles County Sheriffs Department, and in a new trial, a different result would be probable." An attached declaration by plaintiff's attorney was somewhat more concrete: "[The newspaper article] is material to Plaintiff's case because a policy of using a rogue force of sheriffs is subjective deliberate indifference to the safety of Plaintiff."

Cal.App.4th 1642, 1647.) We find no abuse of discretion in the denial of the new trial motion.

DISPOSITION

The judgment is affirmed. Costs on appeal awarded to defendants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KITCHING, J.

We concur:

KLEIN, P.J.

SCHNEIDER, J.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.